SUPREME COURT, U. S.

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IN THE

Supreme Court of the United States

OCTOBER TERM— 1969

No. 155

LEO NEIWIRTH,

Petitioner,

vs.

HYDROCARBON CHEMICALS, INC., and its subsidiaries; BERKELEY SHORE ESTATES, HYSPEC CONTAINER CORPORATION, BURLINGTON DEVELOPMENT COMPANY, INC., HYDROCARBON REALTY DEVELOPMENT CO., INC., LANOKA INVESTMENT CORP., LANOKA HARBOR LAND COMPANY, INC., all New Jersey corporations,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF IN OPPOSITION

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IN THE

Supreme Court of the United States

OCTOBER TERM—1968

No. 1438

LEO NEIWIRTH,

Petitioner,

vs.

HYDROCARBON CHEMICALS, INC., and its subsidiaries; BERKELEY SHORE ESTATES, HYSPEC CONTAINER CORPORATION, BURLINGTON DEVELOPMENT COMPANY, INC., HYDROCARBON REALTY DEVELOPMENT CO., INC., LANOKA INVESTMENT CORP., LANOKA HARBOR LAND COMPANY, INC., all New Jersey corporations,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

Counter-Statement of the Case

Petitioner's recital of the pertinent facts is essentially correct but certain clarification is deemed appropriate.

The Debtor filed a petition seeking an arrangement under Chapter XI of the Bankruptcy Act (11 U.S.C. §701 *et seq.*) on July 10, 1963. This petition was prepared and filed by Robert Friedlander, Esq., the attorney retained by the Debtor for the specific purpose of representing the Debtor in proceedings under said Act. Petitioner, con-

trary to his statement (Petition, p. 3) was not retained by the Debtor but rather was retained by Friedlander to assist Friedlander (2a).

A Receiver was appointed under Chapter XI and two law firms were authorized by the Court to act as his co-attorneys (3a). Additionally, an order was entered appointing an accounting firm to assist the Receiver (3a).

Petitioner did render services during the pendency of the Chapter XI proceedings. These proceedings were terminated by a successful application by stockholders and the S.E.C. for transfer of the proceedings to Chapter X, pursuant to §328 of the Bankruptcy Act (11 U.S.C. §728). Administration under Chapter X commenced on March 17, 1964 and a plan of reorganization was ultimately confirmed and consummated. Applications for allowances were submitted by numerous attorneys, accountants and the respective fiduciaries.

Petitioner sought compensation for the services rendered by him in the Chapter XI phase of the proceedings. In his application, petitioner stated that he ". . . was retained by Robert Friedlander, Esq., attorney for the Debtors . . ." It is conceded that no court order was entered approving his retention or activities on behalf of the Debtor.

The District Court denied any compensation to petitioner, stating that the attorney for the debtor could not arbitrarily hire assistants without first convincing the Receiver of the need for such persons and obtaining court authorization of same. The Court so reasoned particularly in light of the nature of the services petitioner performed: determining validity and priority of claims, a clear function of the Receiver. The Court concluded that petitioner could look to his employer, Friedlander, for

compensation, but could not receive same directly from the estate. The Court *never* considered the value, if any, of the services rendered. There was never a determination that the services were "vital, necessary and fruitful," as alleged by petitioner (Brief p. 3). The Court stated (33a):

> "While I have some reservations about the extent and value of these services, *it is unnecessary to evaluate them.*"

On appeal, the three man panel of the Circuit Court of Appeals for the Third Circuit reversed, 2-1, and remanded for a hearing on the value of petitioner's services (26a). The Trustee filed a petition for rehearing which was granted and the Circuit Court held such rehearing *en banc,* 8 judges sitting.

The Circuit Court *en banc* reversed the decision of the 3-judge panel and affirmed the decision of the District Court. A majority opinion (2a) and two concurring opinions (8a, 9a) were written expressing the reasons for reversal on rehearing. Three judges dissented in a filed opinion (11a).

The thrust of the majority opinion is that petitioner disqualified himself from receiving an allowance by failing to obtain court approval for his retention and rendering of services. The Circuit Court stressed the need for court control of persons seeking allowances under the Bankruptcy Act and found that petitioner had failed to comply with the spirit and letter of Bankruptcy General Order 44, 28 U.S.C.

The concurring opinions recognized that petitioner's services were those ordinarily performed by the Receiver and his counsel. Accordingly, absent a showing of the abdication by the Receiver or his counsel of this duty or

a limitation on the Receiver's powers, a volunteer acting for the Debtor cannot receive an allowance for voluntarily, and without court approval, performing a court officer's function.

The dissenting judges found that Bankruptcy General Order 44 did not preclude compensation to petitioner, nor was petitioner an intermeddler. These three judges would have remanded for an adjudication on the merits of petitioner's claim.

ARGUMENT

The reasons set forth in the petition for writ of certiorari are insufficent to justify granting the writ.

Petitioner has set forth ten reasons for granting the writ at pages 5-7 of his brief. None of the reasons is within the scope of Rule 19(1) (b) of the Supreme Court Rules (U. S. Sup. Ct. Rule 19, 28 U.S.C.). While the history of this case has demonstrated that judicial minds within the Third Circuit may differ on the result reached herein, such fact is not a compulsive consideration in determining whether or not to grant the writ.

Of the considerations governing review on *certiorari* set forth in Rule 19 (1) (b), only two might be alleged to be applicable in the instant case: (1) conflict with another circuit court of appeals or (2) important question of federal law which has not been, but should be, settled by this court. A review of the petition demonstrates that even these possible reasons are absent.

(1) Conflict with another circuit court of appeals decision.

In reason (7) of the petition (at p. 6), petitioner asserts that the final decision of the Third Circuit in the

instant case ". . . is basically in conflict with the philosophy of the following cases . . ." (listing cases). A review of those cases reveals *no* conflict with the instant decision. These cases are treated below in the order listed in the petition.

In re Prudence Co., Inc., 96 F. 2d 157 (2 Cir. 1938) is not in point. That case involved an attorney who had been retained by the debtor and had performed substantial services for it *prior* to the filing of the reorganization petition. The court merely recognized the attorney's charging lien upon the ultimate recovery in favor of the debtor. The case did *not* involve retention after commencement of the proceedings for the performance of tasks allocated to the Receiver by the Bankruptcy Act. There is no conflict between this decision and the instant case.

In re Mt. Forest Fur Farms of America (cited as *Vermilion Bay Land Co.* v. *Fitzgerald* by petitioner) 157 F. 2d 640 (6 Cir. 1946) is wholly consistent, rather than in conflict, with the decision in the instant case. In *Mt. Forest* the court considered eleven separate appeals from the disallowance in whole or in part of requested fees in a Chapter X. The Circuit Court affirmed the District Court in all respects, noting in detail the many judicial and legislative statements calling for economy in bankruptcy administration and avoidance of awarding compensation for duplication of services. Only one attorney for the debtor received an allowance, and that award was for cooperation ". . . in the administration of the estate, the conduct of litigation, and the formulation of the adopted plan." (at p. 651). In fact, the court specifically stated:

> ". . . it has been held that a corporate debtor for whom trustees were appointed could not, without leave of court first obtained, bind the estate to pay

> for services of a lawyer, expert in corporate reorganization, even though retained in good faith by the debtor to formulate a plan of reorganization, and to endeavor to obtain its confirmation."

The quoted passage, together with the court's emphasis on the district court's discretion in denying requested allowances, clearly is *not* in conflict with the decision in the instant case.

The appellants in *Greensfelder* v. *St. Louis Public Service Co.*, 114 F. 2d 53 (8 Cir. 1940) cert. den. *sub nom. Stein* v. *St. Louis Public Service Co.*, 311 U. S. 714, 61 S. Ct. 396, 85 L. Ed. 464 (1940) did not include the attorney for the debtor, let alone supplemental counsel for the debtor or his attorney. Nothing in that case conflicts with the holding in the instant case. The most helpful language to petitioner is ". . . compensation is not to be denied because services to the estate might also be services to a client" (at p. 59). But the court goes on to say that only costs and expenses ". . . allowable under the law and none other" should be paid (at p. 60). Once again, the court emphasizes economy and the trial court's discretion.

Similarly, nothing inconsistent with the instant case appears in *In re Ritz Carlton Restaurant & Hotel Co.*, 60 F. Supp. 861 (D. N. J. 1945) or *In re McGann Mfg. Co.*, 188 F. 2d 113 (8 Cir. 1951). While these cases discuss "benefit" to the estate, they do not consider persons having a comparable relation to the estate as does petitioner in the instant case.

In *Application of Pinetree Associates*, 77 F. Supp. 270 (E. D. N. Y. 1948) the attorney for the debtor had a fully disclosed agreement for sharing his fee with a forwarding attorney. The sharing was approved, but this is con-

sistent with the instant case, where the court stated that ". . . the appellants here were under the impression that they were to be paid by the counsel for the debtor . . ." (5a).

Thus, it clearly appears that petitioner has failed to show that the Third Circuit in the instant case ". . . has rendered a decision in conflict with the decision of another court of appeals on the same mattar . . ." Rule 19(1)(b), *supra.*

(2) Important unsettled question of federal law.

The "important" question postured by the petition involves the employment of supplemental counsel to a debtor in a Chapter X or XI proceeding. The paucity of cases on the subject noted in the petition attests to the relative obscurity of the problem. It may further indicate that diligent counsel have obtained appropriate orders from the court in like cases, thus preventing the problem from ever arising. There is every indication that the matter sought to be reviewed is primarily personal and not a bankruptcy problem of widespread interest or broad application. In such situations this court has indicated that the petition should be denied.

In *Rice* v. *Sioux City Cemetery,* 349 U. S. 70, 75 S. Ct. 614, 99 L. Ed. 897 (1955) this court said;

> "A federal question raised by a petitioner may be 'of substance' in the sense that, abstractly considered, it may present an intellectually interesting and solid problem. But this Court does not sit to satisfy a scholarly interest in such issues. Nor does it sit for the benefit of the particular litigants . . . 'Special and important reasons' imply a reach to a problem beyond the academic or the episodic."

Informal statements by members of this court are consistent with this reasoning:

> "It is not the importance of the parties or the amount involved that is controlling, but the need of securing harmony of decision and the appropriate settlement of questions of general importance so that the system of federal justice may be appropriately administered." Address of Chief Justice Hughes to American Law Institute, May 10, 1934, cited with approval in *Rice* v. *Sioux City Cemetery, supra.*

> "To remain effective, the Supreme Court must continue to decide only those cases which present questions whose resolution will have immediate importance far beyond the particular facts and parties involved . . . A petition for certiorari should explain why it is vital that the question involved be decided finally by the Supreme Court." Address of Chief Justice Vinson to American Bar Association, September 7, 1949, also cited with approval in *Rice, supra.*

It is submitted that no vital, special or important reason for reviewing this matter has been set forth in the petition.

Finally, petitioner asserts that the opinion below is in conflict with General Order 44. It is clear that both the majority and the concurring opinions closely examined both the letter and spirit of General Order 44 (5a-6a, 8a-10a). That Order sets up a careful procedure for the retention and court supervision of counsel participating in a bankruptcy proceeding. The majority opinion, in disallowing fees for failure to apply for or obtain court approval of retention and rendition of attorney services, is wholly consistent with General Order 44.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for writ of certiorari should be denied.

Respectfully submitted,

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Attorneys for Respondent Elliott I. Clemence, Trustee,
By: MICHAEL R. GRIFFINGER.